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MAY 1 1941
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 937

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, a New York Corporation,
Petitioner,

vs.

STANLEY A. MARSHALL, Administrator of the Estate of Jacob M. Marshall, Deceased,
Respondent

RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF CASE

This case was submitted upon an agreed statement of facts (R. 22-26). Necessarily therefore the issues presented are confined to the stipulated facts. The petitioner's statement of case contains most of the agreed facts,

but the statements appearing on page 3 of its brief are interposed with argument and erroneous conclusions of law to which we must take exception.

The controlling provision in the policy of insurance was omitted (Par. 4 Stipulation of Facts, R. 23) and the further agreement of counsel relating to the type and extent of relief to be granted was likewise omitted. Since these provisions of the stipulation are likewise controlling, specific attention of this court should be directed to them. We can conceive of no more accurate statement of the case than the stipulation of facts itself, and since this stipulation is brief, for the convenience of the court, it is here repeated:

STIPULATION OF FACTS

(Filed January 19, 1939)

It is hereby stipulated and agreed by and between the Plaintiff and the Defendant in the above-entitled cause, by their respective attorneys, that the following constitute all of the material facts involved in this case:

I.

On January 8, 1923, The Equitable Life Assurance Society of the United States issued to Jacob M. Marshall of Detroit, Michigan, its certain policy of Life Insurance No. 3,022,849, a photostatic copy of which is hereto attached and made a part hereof. (See exhibit at page 34 of this record.)

II.

Said Policy of Life Insurance contained, among others, the following provision:

"This insurance is granted in consideration of the payment in advance of eight hundred fifty-five and 90/100 dollars and of the payment annually thereafter of a like sum upon each thirtieth day of December, subject to the Conversion Provisions herein stated. These payments include an annual premium of $21.30 for the Double Indemnity and of $63.45 for the Total and Permanent Disability provision granted under this contract."

III.

Said Policy of Life Insurance also contained the following provision:

"In case the Insured after attaining age sixty, and while this policy is in full force and effect, becomes totally and permanently disabled as above described, and furnishes due proof thereof, the Society, subject to the conditions above stated, will on each subsequent anniversary date of this policy during the continuance of such disability waive payment of the premium, if any, for the ensuing policy year, whereupon the amount of insurance shall become reduced by the amount of premiums so waived and subsequent premiums and loan and surrender values shall be reduced proportionately."

IV.

Said Policy of Life Insurance also contained the following provision:

"Disability benefits before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the Insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the insured's age at nearest birthday is 60 years, * * *."

V.

Said Policy of Life Insurance also contained the following provision:

> "Disability shall be deemed to be total when it is of such an extent that the Insured is prevented thereby from engaging in any occupation or performing any work for compensation of financial value, and such total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months."

VI.

Said Policy of Life Insurance also contained the following endorsement:

> "This policy has been approved for waiver of premiums as per endorsement hereon. Each premium waived reduces the insurance hereunder."

VII.

Said Policy of Life Insurance also contained the following endorsement:

> "Subject to its terms and limitations for total and permanent disability, the policy has been approved, during the continuance of the insured's total and permanent disability, for the waiver of premiums, payable on or after December 30, 1936, whereupon the amount of insurance shall become reduced by the amount of premiums so waived, and subsequent premiums and loan and surrender values shall be reduced proportionately. (Dated at New York, May 7, 1937.)"

VIII.

The following dates are material:

(a) Jacob M. Marshall was born July 25, 1875, and became sixty years of age July 25, 1935. Therefore the anniversary date of the Policy nearest Marshall's 60th

birthday was December 30, 1935—five months and five days after Marshall had attained sixty years of age.

(b) On December 24, 1935, six days before the anniversary date of the Policy nearest Marshall's 60th birthday, Jacob M. Marshall was injured in an automobile accident, as a result of which he presented his claim to the Society for disability benefits under the terms of the Policy. The claim was allowed on an over age 60 basis by the Society; Marshall claimed to be entitled to benefits on an under age 60 basis.

It is not claimed by plaintiff that as a result of this automobile accident said Jacob M. Marshall sustained the entire and irrevocable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire foot. As a result of said automobile accident the said Jacob Marshall suffered the following injuries: commutated fracture of right radius at distal end; fracture of third and fourth ribs on left side, posteriorly; as a result of which from December 24, 1935, he was unable to engage in any occupation.

IX.

On April 16, 1937, Marshall surrendered to the Detroit Office of the Society, in connection with his claim for disability benefits, the Policy of Life Insurance in question and received from the Detroit Office of the Society at that time a receipt reading as follows:

"THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES"

New York City

Agency at Detroit, Mich., Apr. 16, 1937

Received from Jacob Marshall

Policy No. 3022,849, to be forwarded to the Home Office of the Society for endorsement of over age

60 benefits. This receipt does not in any way commit The Equitable Life Assurance Society of the United States in any action in connection with the said policy.

H. G. Trochlell, Cashier,
by: A. Urban"

and thereupon the endorsements hereinbefore set forth were placed upon the policy.

X.

Subsequently the Society tendered to the said Jacob M. Marshall its check for $855.90, being the premium due December 30, 1936, which had previously been paid by the said Jacob M. Marshall, but Marshall refused to accept the same, claiming to be entitled to benefits on an under age 60 basis.

XI.

It is agreed that the following questions are involved:

(1) Under the terms of the Policy of Life Insurance in question defining total and permanent disability, is Marshall's disability to be construed as commencing December 24, 1935, or is it to be construed as commencing three months later—March 24, 1936?

(2) Marshall having accepted the return of his policy with the endorsements now appearing thereon under date of May 7, 1937, is his Administrator now estopped to claim benefits on any but an over age 60 basis?

XII.

Jacob A. Marshall died August 9, 1938, the cause of death as stated in claim submitted by plaintiff herein being Angina Pectoris; the duration, twenty-four hours.

XIII.

It is further stipulated that if defendant is correct in the position it takes, plaintiff is entitled to the sum of $855.90, which amount defendant offers to pay.

XIV.

It is further stipulated and agreed, subject to the qualification hereinafter set forth in this paragraph, that if plaintiff is correct in his position, he is entitled to recover at the rate of one hundred fifty ($150.00) dollars a month from December 25, 1935 to August 9, 1938.

Defendant contends that if plaintiff is entitled to recover, under plaintiff's theory of the case plaintiff is entitled to recover only from March 24, 1936, to August 9, 1938.

David I. Hubar,
Herman Kass,
Attorneys for Plaintiff.

Miller, Canfield, Paddock & Stone,
Attorneys for Defendant.

Dated: Detroit, Michigan, the 16th
day of January, 1939.

ARGUMENT

Your respondent respectfully urges that the petitioner's application for writ of certiorari should be denied because:

1. There is no conflict of authorities applicable to the issues in this case.

2. This case involves no issue of public interest.

3. There is no error in the decision of the Circuit Court of Appeals.

I.

THERE IS NO CONFLICT OF AUTHORITIES APPLICABLE TO THE ISSUES IN THIS CASE

While the petitioner does not expressly so state, yet it may be inferred from petitioner's brief that the petitioner asks this court to accept this case on the principal ground that there is confusion in the decisions of the several courts having occasion to pass upon the questions involved.

Your respondent emphatically denies that any confusion or conflict of authorities exist.

The issues in the case at bar are so peculiar to the facts in this case and the special provisions of the policy of insurance involved, that the court may never again be called upon to decide them. Both counsel for the petitioner and the respondent recognized the novelty of the questions, and admitted in oral argument before the Circuit Court of Appeals that the identical questions had never been passed upon in a court of competent jurisdiction.

Those facts which are peculiar to this case and which prior to this action have not been presented to a court of

record and probably never again will be so presented, are briefly as follows:

The deceased respondent for many years carried a policy of life insurance with the petitioner. The policy contained special provision for disability benefits for which the insured paid substantial premiums. These benefits were divided into two classes, over sixty and under sixty age benefits. That is, if the disability occurred prior to the deceased's sixtieth anniversary he would be entitled to considerably greater benefits than if the disability occurred after he had attained the age of sixty.

In the case at bar the insured was seriously injured six days before he had attained the age of sixty, as a result of which injuries he was unable to engage in gainful occupation. Subsequently while the insured was still unable to work, he filed his claim for disability benefits on under age sixty basis. The petitioner approved his disability but allowed benefits on over age sixty basis.

This action was then instituted by the insured to recover on the basis of under age sixty benefits. However, before trial the insured died. His death occurred prior to any recovery and it is admitted his disability was continuous from the time of his injury until his death, and that by reason thereof he could not pursue any gainful occupation during that entire period. Under the terms of the policy of insurance, disability benefits irrespective of whether or not they are payable on an under or over age sixty basis, must be predicated upon the claim that the insured is suffering from total permanent disability. The requirements for recovery on an over age sixty basis are the same as the requirements for recovery on an under age sixty basis. *The petitioner approved disability benefits to the insured on an over age sixty basis.* Therefore clearly the petitioner as a condition precedent to the

approval of the insured's claim for disability benefits had to acknowledge and *approve* of said fact that *the insured was totally and permanently disabled.* The policy of insurance also contained the customary clauses to the effect that if the disability continued for a period of three months from the date of the injury, it would be presumed to be permanent. As indicated, the injury in the case at bar occurred six days prior to the insured's sixtieth birthday anniversary date under the policy. His injury disabled him and he died before recovery. The petitioner claims that the three months presumption clause should apply and that the permanency of the insured's injury did not become established until the expiration of three months after the injury. The petitioner further claims its liability did not accrue until three months after the injury and since at that time the insured was over sixty he was entitled to over age sixty benefits only.

On the other hand, your respondent claims that *the best proof of the permanency of any disability is the death of the insured before recovery.* Since the petitioner approved some disability benefit, such approval necessarily *admitted* the continued disability of the insured from the date of the injury. Since the insured died before recovering it is rather elementary logic that his disability was permanent and that it was permanent during the entire period from his injury to his death. The Circuit Court so held and it is respectfully submitted correctly so.

The petitioner cites three cases (petitioner's brief pages 2 and 3) upon which it rests its claim of the existence of a conflict of authorities. An examination of these cases show them not to be in conflict with the decision of the Circuit Court in the case at bar. Each of the cases contain wholly dissimilar facts and different issues. We beg the indulgence of the court while we analyze each of these cases.

A.

Bergholm v. Peoria Life Ins. Co., 284 U. S. 489 (1932)

(1) None of the controlling facts present in the case at bar are present in the case cited.

(2) Wholly different from the case at bar, in the case cited the policy of insurance contained an express provision limiting the company's liability for disability benefits to those benefit installments becoming *due* after receipt of proof of permanent disability. This fundamental distinction becomes readily apparent from the following quotation from the policy of insurance in the case cited:

> "To pay for the insured all premiums becoming due thereon after receipt of such proof."

That court clearly recognized the same distinction that we urge to this court as is apparent from the following language in the same opinion, on page 491:

> "Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof."

(3) The policy involved in the case at bar contained no similar reservation that the company's liability for disability payments shall commence with those payments due after proof of disability. This is clearly demonstrated from the following language of the opinion of the Circuit Court of Appeals in the case at bar:

> "The assertion that the disability benefits 'shall be effective upon receipt of proof' that total and

> permanent disability befell assured before age sixty is not equivalent to a statement that the insurer shall not be liable for the first three months of such disability, or shall not have the basis of its liability for disability benefits fixed as of the date of actual total and permanent disability. It seems clear from the policy that the disability benefits to which assured would be entitled must be established by the event of total and permanent disability. The maturity of the time for paying assured for his first three months' disability is merely postponed until the furnishing of the required proof. In our judgment, this is the correct interpretation of the terms of the policy."

That this situation created a fundamental distinction from the case at bar from the case cited, is recognized from the further language of the opinion of the lower court. Indicating that a case cited by the petitioner *(Corbett v. Phoenix Mutual Life Insurance Company,* 144 Misc. Rep. (N. Y.) 872) involving a policy of insurance with similar provisions as in the Bergholm case recited to this court, had no application to the issues in the case at bar, Judge Martin said, speaking for the court:

> "In the first case on the list, the undertaking of the insurer was unequivocal that *beginning at the date of receipt of proof of disability* the insured would be paid a stipulated monthly income. In the second case listed, the policy under construction expressly declared that in no event should disability benefits 'relate back prior to three months from the commencement of total disability.' "

B.

Wetherall v. Equitable Life Assurance Society, 273 Mich. 580 (1935)

(1) The controlling fact in this case cited and not present in the case at bar was the fact that the insured had recovered prior to the time he made a claim for total permanent disability benefits.

(2) That this fact was the determining element in the decision of the court in the case cited, as is apparent from the opinion of the court on page 583:

> "Having recovered from his total temporary disability, can disability be held total and permanent within the terms of the insurance contract?
>
> That it was total for a period is manifest, but time has demonstrated that it was but temporary and not permanent."

(3) The decision of the court is founded squarely on this special fact not present in the case at bar. We quote from the same opinion of the court on page 585:

> "Plaintiff's disability was total for many months but was neither total nor permanent when he sought compensation."

C.

Orr v. Mutual Life Insurance Co., 64 F. (2d) 561, U. S. Circuit Court of Appeals (Eighth Circuit) 1933

(1) The controlling fact in the case cited and not present in the case at bar is the express provision in the policy of insurance that disability payments shall *commence* with the first payment due *after* the approval of proof of disability.

(2) That this special provision was determinative of the decision of the court is emphasized by the court in the use of italics in each case the special provision is mentioned. Thus in one of the three principal cases relied upon by the petitioners in support of its application for certiorari, the very distinction between the case at bar and the case cited is apparent in the opinion of the court in the case cited. It is not very often that a distinction is so thoroughly and deliberately emphasized as was done in the case cited.

(3) The court's opinion is founded squarely on the special provision in the policy of insurance in the case cited and not present in the case at bar. This is clearly indicated by the following language found on page 562 of the court's opinion:

> " 'Income to Insured.—*The Company will,* during the continuance of such disability, *pay to the Insured a monthly income* at the rate of ten dollars for each one thousand dollars of the face amount of this Policy (but not including dividend additions), *the first such monthly payment being due on receipt of said due proof* and subsequent payments on the first day of each calendar month *thereafter,* if the Insured be then living and such disability

still continue. *No income payments, however, will be made prior to approval of such proof by the Company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due.'* ''

''There is no possible ambiguity in this language. It means just one thing and that is that waiver of premiums *commences* 'with the first premium due after approval of said due proof' and that, as to payment of monthly benefits, the 'first such monthly payment being due on receipt of said due proof.' There are no other statements in the policy which, in the slightest degree, qualify or weaken or throw doubt upon this language. Since 'contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense.' ''

(4) The Circuit Court in the case at bar recognized this essential and fundamental difference in fact, as is apparent from the following language from the opinion of Judge Martin, speaking for the court:

''Thus, it becomes apparent that these four cases relied upon by the District Judge do not involve the same policy provisions as those presented for interpretation in the case at bar. And the same may be said of *Orr v. Mutual Life Insurance Company of New York,* 64 F. (2d) 561, urged upon us by appellee.''

D. It must follow that the decision in the case at bar is not in conflict with any of the cases cited by the petitioner. Neither does there exist any confusion between the several courts over a determination of any of the issues here presented. Your respondent respectfully urges that the decision of the lower court was correctly

founded on the special facts in the case at bar and does no more than establish the law in this case. To the knowledge of your respondent, no similar combination of facts has ever been presented for determination before a court of record and probably will not again in the future. We emphasize this to refute completely the petitioner's claim that this court should accept this case because a decision by the court will tend to remove a conflict of authorities.

II.

THIS CASE INVOLVES NO ISSUE ON PUBLIC INTEREST

It must be conceded before a case can be said to involve an issue of public interest, that a decision will affect the rights of a large number of individuals. This is not and cannot be the situation here.

Before a case with similar issues might be presented to some court at some future time, it will require the existence of essentially similar facts as the case at bar. The possibility of this is extremely remote for the following reasons:

(1) The insured would have to be injured within ninety days before he reached his sixtieth birthday anniversary date:

(2) His disability would have to continue for more than ninety days.

(3) He would have to die before he recovered from his disability.

(4) His contract of insurance would have to contain the same or similar provisions as are contained in the petitioner's contract of insurance.

While the same contract of insurance may be in the possession of a number of parties, the particular issues involved in the case at bar are confined to the co-existence of all of the first three above mentioned facts. The decision of the Circuit Court of Appeals is predicated squarely upon and expressly confined to the above factual situation. Clearly the possibility of the recurrence of the same or similar combination of facts is extremely remote. This court must recognize the doubtful possibility of another insurance beneficiary sustaining an injury within ninety days of his attaining age sixty, which injury permanently disabled him, continued for a period of ninety days and there was no recovery before death. Certainly we can contemplate no large number of similar situations in the future. If the facts were slightly different, we might anticipate a larger number of claims. However, there is ample settled authority already existing which would apply under different circumstances. That is, if the injury occurred more than ninety days before the insured attained age sixty, there admittedly would be no question of his right to recover under age sixty benefits. Conversely, if his injury had occurred after he had attained age sixty, there could be no question that his recovery would be confined to over age sixty benefits. There are ample authorities in support of these situations which might be said to be of rather common occurrence.

However, the issues in the case at bar are confined to the facts in the case at bar and confined to an injury occurring within a period of ninety days prior to the insured attaining age sixty. Or to put it in another way, the insured would have to attain age sixty within ninety days after he had sustained his permanent disability. Clearly this recurrence of a similar situation is extremely remote. We therefore respectfully disagree with the con-

tention of the petitioner that this case should merit the attention of this high court on the ground that it involves an issue of public interest.

III.

THERE IS NO ERROR IN THE DECISION OF THE CIRCUIT COURT OF APPEALS

This case was submitted upon an agreed statement of facts. Necessarily the court must be confined to these facts for consideration of the legal questions involved. As already indicated, the special facts in this case so restrict the issue that both counsel agree that no direct authority can be found.

Certainly then, any decision in this case is confined to the statement of agreed facts and merely becomes the law in this case. However, the overwhelming weight of authority applied through analogy and reasoning supports the decision of the Circuit Court of Appeals. Judge Martin speaking for the court, recognized the weight of this authority when he said:

> "We shall, therefore, rest content to cite for comparison, without discussion, a few cases, distinguishable on facts but grounded in reasoning deemed similar in various aspects to our own in the instant case. Upon such terms, consult: *Minnesota Mutual Life Ins. Co. v. Marshall,* 29 F. (2d) 977, (C. C. A. 8); *Lydon v. New York Life Ins. Co.,* 89 F. (2d) 78, 81 (C. C. A. 8); *Kingsford v. Business Men's Assurance Co.,* 57 Idaho 727, 68 Pac. (2d) 58; *Hablutzel v. Home Life Ins. Co. of New York* (Missouri), 52 S. W. (2d) 480; *Mutual Life Ins. Co. of New York v. Smith,* 257 Ky. 709, 715, 716, 717, 721, 79 S. W. (2d) 28."

We beg the indulgence of this court in considering the following authorities which further sustain the reasoning and conclusion of the lower court:

IV.

UNDER PROVISIONS OF POLICY ONLY CONDITION REQUIRED TO OCCUR PRIOR TO ANNIVERSARY OF POLICY NEAREST INSURED'S SIXTIETH BIRTHDAY IS HIS TOTAL PERMANENT DISABILITY

A. Purpose of Three Month Provision:

Before entering into the discussion of whether the three month presumptive period must elapse prior to the anniversary of the policy nearest the insured's sixtieth birthday as a condition precedent, the purpose of insertion of such provisions in contracts of insurance as interpreted by the courts will be discussed.

The clause provides:

> "TOTAL DISABILITY shall be presumed to be PERMANENT when it is present and has existed continuously for not less than three months."

In *Graham v. Equitable Life Assur. Society,* (1936), 221 Iowa, 748 at 753; 266 N. W. 820, the identical clause above quoted was construed by the court as follows:

> "We think that the clause in the contract providing for this presumption is wholly an evidentiary matter. It was not intended to create or enlarge liability, and was put in the policy only for the benefit of the claimant to reduce the difficulties of proving the permanency of the disability."

The provisions involved in the next cited cases for the purpose of the problem here involved, are legally identical with the quoted clause in the case at bar.

In *Triplett v. Equitable Life Assur. Soc.* (1936) 117 W. V. 537, 186 S. E. 124, the court held that the presumption of disability was for the convenience and benefit of the insured in that it provided him with a method of establishing the evidence necessary to prove the permanency of his total disability.

In *Thorne v. State Mut. Life Assur. Co.,* (1935) 13 N. J. Misc. R. 271, 177 A, 665, the court held that such a provision was an agreement between the insurer and the insured which permitted the insured to substitute for actual proof of permanent disability the contractual presumption thereof on the fact that his disability had continued for 90 days.

In *Lando v. Equitable Life Assurance Co. of U. S.* (Dist. Ct. N. D. Cal., S. D., 1935) 11 Fed Sup. 729 at 732, the court, considering the nature of the clause, stated:

> "Due proof means sufficient evidence to support or produce a conclusion; adequate evidence. *Bagnall v. Travelers' Ins. Co.,* 111 Cal. App. 714; 296 P. 106; *Standard Accident Ins. Co. v. Bennett,* (C. C. A.) 16 F. (2d) 721, 822, 49 A. L. R. 1524; *Jarvis v. Northwestern Mutual Relief Ass'n.,* 102 Wis. 546, 78 N. W. 1089, 72 Am. St. Rep. 895. It is fairly to be inferred that in order that the contracting parties might have a mutual understanding, or a guide by which to measure permanence, which in the circumstances is necessarily speculative or conjectural, it is provided that proof of total disability having existed for the respective periods specified shall warrant a presumption that the total disability is permanent. The presumption is contractual, and upon that proof being made it is no longer

reputable. *Dietlin v. Mo. State Life Ins. Co., supra.* Unless indulged in prior to events which may prove or disprove it, the presumption is a conclusion based upon evidence."

Accord: *Stanley v. John Hancock Mut. Life Ins. Co.,* (1935) 156 Misc. 460, 281 N. Y. S. 871.

Permanent disability as used in a contract of insurance means that disability is based upon a condition which renders it reasonably certain at the time that it will continue throughout the life of the insured. *Culver v. Prudential Ins. Co.* (1935), 36 Del. 582, 179 A. 400. Otherwise stated, it means a present disability which has every indication of continuing until the death of the insured, and as to which there is no present reasonable and apparent probability of future recovery. *Prudential Ins. Co. v. Litzke,* (1935) 36 Del. 592, 179 A. 492; *Metropolitan Life Ins. Co. v. Noe,* (1930), 161 Tenn. 335, 31 S. W. (2) 689; *Bowen v. Metro Life Ins. Co.* (1933), 17 Tenn App. 332, 67 S. W. (2) 164; *Maze v. Equitable Life Ins. Co.,* (1933), 188 Minn. 139, 246 N. W. 737.

It is therefore absurd to assert that the time when the disability became permanent is not the date of its actual physical occurrence but the date upon which presumptive proof of its permanence is established through lapse of the three month period. Such claim is equivalent to an assertion that the date of the occurrence of an event in the eyes of the law is not the time that the thing actually happens, but the time when its occurrence is established by a presumption.

It is obvious that under most conditions it is difficult to establish with certainty that a total disability is permanent. As a matter of fact, the only *positive* proof of permanenency of a total disability is evidence that it con-

tinued from the occurrence of the disability to the death of the insured, yet no one would contend, if this method of proof was relied upon, that the disability of the insured became permanent at his death. In *National Standard Life Ins. Co. v. Smith,* (Tex., 1934) 75 S. W. (2) 1102 at 1104, the evidence of permanence considered by the court was that disability continued until death. The court held that the total disability was permanent as of the time of the occurrence of the disability.

> "His disability became total prior to the expiration of the grace period and so continued until he died. Hence his total disability was permanent."

The presumption created by the continuous total disability for a period of three months was inserted in the contract of insurance here involved for the purpose of aiding the insured in establishing evidence of the permanence of his disability. There is as little reason for the contention that the disability became permanent at the expiration of the presumptive period as there is for saying that the disability became permanent upon the death of the insured. The only distinction between the foregoing situation is that the former is only presumptive proof of permanence while the latter is positive proof of permanence.

In the case of *Shea v. Aetna Life Insur. Co.* (1935), 198 N. E. 909 at 913, 292 Mass. 584, the court stated that the passage of the presumptive period inserted in the contract of insurance:

> "* * * is evidential of the permanent nature of the disability as of the time it came into existence."

B. Policy Does Not Require That Presumptive Period Must Expire Prior to the Stated Anniversary of the Policy.

As has been pointed out above, the purpose of inserting in the policy of insurance the provision that:

> "Total disability shall be presumed to be permanent when it is present and has existed continuously for not less than three months" (R. 24, 42),

was to aid the insured in a doubtful case in establishing the permanence of his disability so that he could take advantage of the benefits of the policy arising upon his total permanent disability. There is nothing in the clause which requires that the three month period must elapse *prior* to the anniversary of the policy nearest the insured's sixtieth birthday.

Clearly, there are two distinct questions involved:

(1) Whether or not the insured is entitled to under age sixty disability benefits, and

(2) Whether the insured is entitled to disability benefits from the time of the occurrence of his total permanent disability until his death, or only for the period between the time of giving proof of his total permanent disability and the time of his death.

Whenever the courts have met with this situation, they have always recognized the existence of two distinct questions. *Kimel v. Missouri State Life Insurance Co.* (C. C. A. 10, 1934), 71 F. (2d) 921, at 924. *Prudential Insurance Company of America v. Kendrick* (1935), 262 Ky. 297, 90 S. W. (2d), at 54. *Mutual Life Insurance Company of New York v. Smith* (1935), 257 Ky. 709, 79 S. W. (2d) 28, at 31-32. *Shea v. Aetna Life Insurance Company* (1935), 292 Mass. 585, 198 N. E. 909, at 914.

The problem in the second question refers only to the period for which disability benefits shall be paid. This question is discussed later in the brief. For the time being, the attention of the court is respectfully directed to the problem involved in the first question.

To support the petitioner's claim, the language of the policy must be interpreted as providing that after the occurrence of the disability, three months of continuous total disability must elapse before the anniversary of the policy nearest the insured's sixtieth birthday. Such an interpretation is obviously impossible, since the contract of insurance provides that under age sixty disability benefits will be paid if:

> "* * * the insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits * * *" (R. 42).

Under the policy of insurance here involved, proof could have been made before the expiration of the three month period by evidence of the probability of the continuance of the disability. If such proof was made, the three month presumptive period would be as ineffectual as if it had not been included in the policy.

As stated in *Mutual Life Insurance Company v. Morris* (1935), 191 Ark. 88, 83 S. W. (2d) 842, at 845:

> "Nor is there any provision in the policy denying to the insured the privilege of establishing his total and permanent disability before four months have elapsed after the beginning of the disability."

Since the purpose of the insertion of the three month period in the contract of insurance was to establish a method

of proving the permanency of the total disability of the insured, to support the position of the Petitioner, the contract of insurance must be so construed as to require that the total permanent disability of the insured must occur and proof thereof must be made prior to the anniversary of the policy nearest the insured's sixtieth birthday.

C. Policy Does Not Require That Proof of Permanency of Disability Must Be Made Prior to the Stated Anniversary of the Policy.

The relevant provisions of the policy are quoted below:

> "IF THE INSURED BECOMES WHOLLY AND PERMANENTLY DISABLED BEFORE AGE 60, THE SOCIETY will waive subsequent premiums and pay to the insured a disability annuity of ONE HUNDRED & FIFTY DOLLARS —a month subject to the terms and conditions contained in third page hereof" (This appears on the face of the policy) (R. 35).
>
> "(1) DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof, before default in the payment of premiums, that the insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which the Insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits * * *" (R. 41, 42).

Eliminating the words in clause (1) not necessary for a consideration of the problem here involved, that clause reads:

> "DISABILITY BENEFITS before age 60 shall be effective upon receipt of due proof * * * that the insured became totally and permanently disabled * * * after this policy became effective and

> before its anniversary upon which the Insured's age at nearest birthday is 60 years."

The only condition required by the above to occur before the stated anniversary is the total and permanent disability of the insured before the stated anniversary. That this is the intent of the parties is conclusively evidenced by the provision on the face of the policy that the insured shall be entitled to disability benefits upon becoming permanently and totally disabled before the stated date.

In the case of *Mutual Life Insurance Company of New York v. Smith* (1935), 257 Ky. 709, 79 S. W. (2d) 28, at 31-32, the court considered the effect of disability provisions in a contract of insurance which was headed "Benefits in the Event of Total and Permanent Disability Before Age Sixty" (p. 29). Following that provision was a clause:

> "If the insured * * * shall before attaining the age of sixty years * * * furnish due proof to the company * * * that he has become totally and permanently disabled * * *" (p. 29).

The last quoted provision unquestionably made the furnishing of proof of disability prior to age 60 a condition precedent to, under age 60 benefits. The court nevertheless held that the insured was entitled to his under age 60 disability benefits because the heading of the disability provision made no mention of the requirement of giving notice before age 60 but instead created the impression that the sole condition required to occur before that time was a total and permanent disability of the insured.

At pages 31-32 of the opinion, the court held:

> "It chose its own words and constructed the sentences as they appear in the policies. Persons with usual and ordinary understanding would construe the sentence, 'Benefits in the Event of Total and Permanent Disability Before Age Sixty' to

mean that if the insured paid his premium, kept the policy in force, became totally and permanently disabled before age sixty, and thereafter furnished the company satisfactory proof of disability, the Mutual Life is obligated by the entire language of the disability provisions to pay thereunder the insured one-tenth of the face amount of the policy, commencing one year after the anniversary of the date of the issue of the policies next succeeding the receipt of the Mutual Life of due proof of disability, and a like sum on each anniversary thereafter if the insured be then living and such disability being then continued."

* * * * *

"With these generally accepted rules in mind, a reading of the policies convinces us that Smith's furnishing the proof of disability to the Mutual Life was not a condition precedent 'to the creation of a coverage for his disability or of any liability for disability benefits,' but was a condition precedent only to his rights to enforce the payment of the disability benefits."

The provision on the face of the policy that if the insured "became wholly and permanently disabled before age 60, the society will waive subsequent premiums and pay the insured a disability-annuity of $150.00 per month, subject to the terms and conditions on the third page hereof," is an assertion by the insurer to the insured that the only condition that need occur in order that the insured may realize disability benefits is his total permanent disability before age 60. This case presents a stronger legal situation than the Smith case above, because here the additional provisions covering disability benefits were not on the same page. In the Smith case, the provision followed immediately after the topic heading.

For this reason alone, therefore, the giving of proof of disability cannot be considered a condition which must occur before the stated anniversary of the policy. As has been shown above, however, and as will be shown by the further discussion there is nothing in any of the clauses of the policy of insurance requiring that proof of disability be given prior to the anniversary of the policy nearest the insured's sixtieth birthday.

If it had been the intention of the parties to this contract of insurance that payment of disability benefits was to be dependent upon making proof of disability prior to the stated anniversary, it would have been so provided in the policy; *Kingsford v. Business Men's Assur. Co. of America,* (Idaho, 1937), 68 P. (2d) 58, at 60.

In *Kimel v. Missouri State Life Ins. Co.,* (C. C. A. 10, 1934) 71 F. (2d) 921, the facts were that the insured become totally and permanently disabled before attaining 60 years of age. Proof of disability was not filed until insured was 64 years old. The policy provided that the defendant pay certain disability benefits upon receipt of proof that the plaintiff had become totally and permanently disabled before attaining age sixty. The defendant in that case contended that proof of disability had to be made prior to the time the insured became sixty years of age. At page 924 of the opinion the court held:

> "Under the insurance contract the obligation to pay total and permanent disability benefits is not conditioned on disability arising and proof being made thereof before the insured attains the age of sixty, but only on such disability arising before the insured attains that age * * *."
>
> * * * * *
>
> "Proof fixes the time of payment, but disability arising before assured has attained the age of sixty raises the obligation to pay."

In *Prudential Ins. Co. of America v. Kendrick,* (1935) 262 Ky. 297, 90 S. W. (2) 52, insured became totally disabled before age 60 but proof thereof was not furnished until insured was well over 60 years old. The policy of insurance provided for total and permanent disability benefits:

> "* * * if such disability shall occur * * * while this policy is in full force and effect and said one of the insured is less than sixty years of age * * * the Company, upon receipt of due proof of such disability will grant the following benefits (p. 53, 90 S. W. (2))."

In interpreting the effect of the quoted provisions of the policy the Court at pages 54-55 of the opinion stated:

> "His disability having occurred, and the Prudential's liability to him under the disability clause having existed before he arrived at the age of sixty, his right to recover therefor continued until barred by the statutes of limitation, unless the quoted clause of the policy contains language providing for a forfeiture of, or makes the furnishing of proof of disability a condition precedent to, his right to recover."
>
> * * * * *
>
> "* * * it is likewise a permanent rule that the insuror is, without right to and cannot complain of the insured's delay in furnishing proof of disability, in the absence of a policy provision providing a forfeiture or limiting the time thereof (citing cases)."
>
> "It will be observed from a simple reading of the clause of the policy now under consideration, that it merely postpones the payment of the disability benefits until Kendrick furnished the Prudential proof of his disability, and does not make the furnishing of the proof a condition precedent

to its liability nor provide a forfeiture, if he failed to furnish proof thereof before attaining the age of sixty (citing cases)."

"Its requirement respecting the furnishing of the proof of disability is only a condition precedent to his right to collect, or compel the payment of the disability benefit."

Accord: *Prudential Ins. Co. of Am. v. Alsobrook,* 266 Ky. 442, 99 S. W. (2d) 210 (1936);
Shea v. Aetna Life Ins. Co., 198 N. E. 909, 292 Mass. 584, (1935).
Allen v. Travelers Ins. Co., 171 Misc. 257, 11 N. Y. S. (2d) 631; aff. 258 App. Div. 714, 15 N. Y. S. (2d) 137, (1939).

The above cases are legally indistinguishable from the one at bar and determine that the only condition that need occur under the contract of insurance here involved is that the total and permanent disability of the insured happen prior to the anniversary of the policy nearest insured's sixtieth birthday.

The case of *Hablutzel v. Home Life Ins. Co. of N. Y.* (1932), 52 S. W. (2d) 480, (affirmed 332 Mo. 920), is cited for the purpose of indicating the extent to which the courts will go in order to protect the insured and impose the duty on the insurer to provide under age sixty disability benefits to the insured.

The policy in that case provided:

"If * * * the insured shall, before attaining the age of sixty years, furnish due proof to the company that he became totally disabled * * * so that he is * * * permanently * * * incapacitated * * * the company by endorsement hereon shall agree to waive the payment of premiums which may thereafter fall due * * *."

Total permanent disability occurred before age sixty. In considering the effect of furnishing proof thereof after age sixty, the court at page 483 of the opinion held:

> "It is true, that the policy provision in the present case, giving it a literal construction seems to require the proof to be furnished before the insured attains the age of sixty years. It is difficult to believe, however, that it was intended that in this respect time should be regarded as of the essence of the contract. What possible difference could it make whether the proof be furnished before or after the insured attains the age of sixty years? The vital condition is that the disability occur before he attains that age.
>
> "It will not do to construe too literally a policy provision such as this. The purpose of the provision must be looked to for guidance. If we should construe the provision literally, the furnishing of due proof would be conclusive, so that the company would not be permitted to question the proof furnished, but would be compelled to waive the payment of premiums upon the furnishing of the proof, for this is just what it literally agrees to do. This shows to what absurdity a literal construction may lead."

This holding was commenced in *Schuerman v. General American Life Ins. Co.* (1937), 232 Mo. A. 352, 106 S. W. (2) 920, and part of the above quotation from the Hablutzel case was cited with approval at page 923 of the opinion.

Accord: *Minn. Mutual Life Ins. Co. v. Marshall,* (C. C. A. 8, 1928) 29 F. (2) 977 at 978.
Mutual Life Ins. Co. of N. Y. v. Smith, (1935) 257 Ky. 709, 79 S. W. (2) 28.

There is nothing then in the policy of insurance which requires that proof of disability be given prior to the

anniversary of the policy nearest the insured's sixtieth birthday.

In conclusion, it is submitted that there is no error in the decision of the Circuit Court of Appeals. This decision is in conflict with no existing authorities and there in fact exist no conflicting authorities on the issues herein presented. The stipulation of facts presents a situation peculiar to this case and does not present an issue of general importance which would justify the time and attention of this high court requisite to a review. Respondent prays that the application for certiorari be denied.

Respectfully submitted,

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